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Attorney General

**Advisory Memorandum:
Avoiding Unconstitutional
Takings of Private Property**

December 2003



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STATE OF WASHINGTON
OFFICE OF THE ATTORNEY GENERAL
ADVISORY MEMORANDUM AND RECOMMENDED PROCESS
FOR EVALUATING PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS
TO AVOID UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY

DECEMBER 2003

I. INTRODUCTION

A. PURPOSE

The Office of the Attorney General is directed under the Growth Management Act to advise state agencies and local governments on an orderly, consistent process that better enables government to evaluate proposed regulatory or administrative actions to assure that the actions do not result in unconstitutional takings of private property. RCW 36.70A.370.

This process must be used by state agencies and local governments that are required to plan, or that choose to plan, under RCW 36.70A.040 – Washington’s Growth Management Act. The process used by state agencies and local government agencies is protected by attorney-client privilege, and a private party does not have a cause of action against a state agency or local government for failure to utilize the recommended process. RCW 36.70A.370(4).

B. ORGANIZATION

This document consists of two parts: the “Advisory Memorandum for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property” (Section I) and the “Recommended Process” (Section II). The Advisory Memorandum discusses constitutional principles relating to the taking of property and the area of substantive due process. The Recommended Process identifies the manner in which the guidance provided by the Office of the Attorney General may be incorporated into an agency’s thinking when enacting and applying regulations. The attached Appendix A contains discussions of significant court cases in the area of takings laws and substantive due process.

Prior editions of this document were published in February 1992, April 1993, and March 1995. Those editions are superseded by this document.

II. ADVISORY MEMORANDUM

**EVALUATING PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO AVOID
UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY**

The purpose of this Advisory Memorandum is to provide a tool to assist state agencies and local governments in evaluating whether proposed administrative or regulatory actions may result in a taking of private property or raise due process concerns. Where state agencies or local governments exercise regulatory authority impacting the use of private property, they must be sensitive to the constitutional limits on their authority to regulate private property rights. The failure to recognize these constitutional limits may result in the judicial imposition of an obligation to pay compensation where regulatory activity is found to have taken private property. In other cases, state agency or local government regulations may be invalidated, and there may be liability for actions taken under those regulations if they are found to exceed applicable constitutional limitations.

The Advisory Memorandum begins with an Executive Summary of the general constitutional principles that surround the question of whether a government regulation may become so severe that it constitutes a taking of private property or violates due process rights.

The Advisory Memorandum next provides a list of warning signals – situations that may implicate constitutional issues. The warning signals are useful as a general checklist to evaluate planning actions, specific permitting decisions, and proposed regulatory actions. The warning signals do not establish the existence of a problem, but they can highlight specific instances where actions should be further assessed by staff and legal counsel.

Finally, the Advisory Memorandum includes a more detailed discussion of some legal principles relating to the field of constitutional takings and substantive due process derived from cases which have interpreted these constitutional provisions in specific fact situations. Summaries of important takings cases are provided in the attached Appendix A.

The Advisory Memorandum is intended as an internal management tool for agency decision makers. It is not a formal Attorney General's Opinion under RCW 43.10.030(7) and should not be construed as an opinion by the Attorney General on whether a specific action constitutes a taking or a violation of substantive due process. Legal counsel should be consulted for advice as to any particular action that may involve a constitutional taking or due process violation.

A. EXECUTIVE SUMMARY

Government has the authority and responsibility to protect the public health, safety, and welfare. This is an inherent attribute of sovereignty. Pursuant to that authority, the government has the ability to regulate or limit the use of property.

Police power actions undertaken by the government may involve the abatement of public nuisances, the termination of illegal activities, and the establishment of building codes, safety standards, and sanitary requirements. Government does not have to wait until a problem has actually manifested itself. It may anticipate problems and establish conditions or requirements limiting uses of property that may have adverse impacts on public health, safety, and welfare.

The government also may limit the use of property through land use planning, zoning ordinances and development regulations, setback requirements, environmental regulations, and similar regulatory limitations. Land uses may be limited through conditions such as the granting of easements and exactions of private property for public use that are addressed to identifiable impacts from land use activities.

Nevertheless, courts have recognized that if government regulations go “too far,” they may constitute a taking of property. This does not necessarily mean that the regulatory activity is unlawful, but rather that the payment of just compensation may be required. The rationale is based upon the notion that some regulations are so severe in their impact that they are the functional equivalent of an exercise of the government's power of eminent domain (i.e., the formal condemnation of property for a public purpose that requires the payment of “just compensation”).

When evaluating whether government action goes too far and has resulted in a taking of a specific piece of private property, courts typically engage in a detailed factual inquiry that evaluates and balances the government's intended purpose, the means the government used to accomplish that purpose, and the financial impact that has been visited upon the property. Severe financial impacts, unclear government purposes, or circumstances where a less intrusive means for accomplishing the identified purpose was bypassed are some of the factors that can tip

the scale in favor of a determination that the government has taken property. The presence of these factors does not necessarily establish a taking of property, but should be considered and evaluated to determine if another course of action would achieve the government's purpose without raising the same concerns.

In some limited cases, a taking claim will not be evaluated using the detailed factual inquiry and balancing of interests. For example, where government regulation results in some permanent or recurring physical occupation of property, a taking exists and just compensation for the occupation must be paid. In addition, where government regulation permanently deprives an entire piece of property of all its economic utility, and where there is no long-standing legal principle such as a nuisance law that supports the government regulation, then a taking has occurred and just compensation must be paid.

Washington courts have also recognized that principles of substantive due process may be a parallel inquiry when government action has an appreciable impact on property. Courts use a balancing test that is similar in many respects to the balancing of factors that is considered in the classic takings test. Ultimately, courts look to whether the government action reasonably works to advance a legitimate state interest. If not, the action is likely to constitute a violation of the due process obligation that government owes to its citizens when it takes some action affecting their rights or interests. Unlike takings law, a violation of substantive due process results in the invalidation of the government action, rather than the payment of just compensation, because government action that violates principles of substantive due process is fundamentally unlawful.

Ultimately, government regulation of property is a necessary and accepted aspect of modern society and the constitutional principles discussed in this Advisory Memorandum do not require compensation for every decline in the value of a piece of private property. However, government regulation that unjustifiably eliminates all economic value of a piece of land, that results in a physical occupation of property, or that ends up appropriating private property for some public benefit rather than addressing some public impact from the use of the property may constitute a taking and require the payment of just compensation. Government action that severely impacts the value of property and that fails to substantially advance a legitimate state interest may constitute a violation of substantive due process and result in an invalidation of the government's action.

B. WARNING SIGNALS

The following warning signals are examples of situations that may raise constitutional issues. The warning signals are phrased as questions that state agency or local government staff can use to evaluate the potential impact of a regulatory action on private property.

State agencies and local governments should use these warning signals as a checklist to determine whether a regulatory action may raise constitutional questions and require further review.

The fact that a warning signal may be present does not mean there has been a taking or substantive due process violation. It means only that there *could* be a constitutional issue and that staff should carefully review the proposed action with legal counsel. If property is subject to the regulatory jurisdiction of multiple government agencies, each agency should be sensitive to the cumulative impacts of the various regulatory restrictions.

1. Does the Regulation or Action Result in a Permanent or Temporary Physical Occupation of Private Property?

Government regulation or action resulting in a permanent physical occupation of all or a portion of private property will generally constitute a taking. For example, a regulation requiring landlords to allow the installation of cable television boxes in their apartments was found to constitute a taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

This is one of two “categorical” forms of property takings. It does not require any investigation into the character of or justification for the government’s actions. It is premised upon the belief that a permanent physical occupation is such an unusual and severe impact on property that it will always be treated as an action that requires the payment of just compensation. However, because this is such a strict and narrow test it only applies when the government physically occupies the property or provides another person the right to do so.

2. Does the Regulation or Action Deprive the Owner of All Economically Viable Uses of the Property?

If a regulation or action permanently eliminates all economically viable or beneficial uses of the land, it will likely constitute a taking. In this situation, the government can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other pre-existing limitations on the use of the property. *See Lucas v. South Carolina Coastal Coun.*, 505 U.S. 1003 (1992).

This is the other narrow categorical form of taking that does not balance the government’s interests in regulation against the impact of regulation. However, unlike the impact of a permanent physical occupation, it is necessary to analyze the regulation’s economic impact on the property as a whole, and not just on the portion of the property being regulated. Accordingly, it is important to assess whether there is any profitable use of the remaining property available. *See, e.g., Florida Rock Industr., Inc. v. United States*, 791 F.2d 893 (Fed Cir. 1986). The existence of some economically viable use of the property will preclude the use of this categorical test. Furthermore, the remaining use does not necessarily have to be the owner’s planned use, a prior use, or the highest and best use of the property. However, the fact that some value remains does not preclude the possibility that the regulatory action might still be a taking of property under other takings tests that balance economic impact against other factors.

Regulations or actions that require all of a particular parcel of land be left substantially in its natural state should be carefully reviewed.

In some situations, pre-existing limitations on the use of property could insulate the government from takings liability even though the regulatory action ends up leaving the property with no value. For example, limitations on the use of tidelands under the public trust doctrine probably constitute a pre-existing limitation on use of property that could insulate the government from takings liability for prohibiting development on tidelands. *See Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 983 (9th Cir. 2002); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988). A proposed land use that is precluded by principles of nuisance law is another example. However, the Supreme Court has made it clear that this principle does not apply simply because the property was acquired after a regulation prohibiting some land use was enacted. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). A pre-existing limitation on the use of property must be a long-standing property or land use principle before it will effectively insulate the government from takings liability in those rare cases where the property is left with no value. However, the pre-existing nature of any regulation that limits the use of property may be an important consideration for other takings

tests because it may demonstrate whether the landowner had a reasonable expectation of using the property in some manner. This issue should be carefully evaluated with legal counsel.

3. Does the Regulation or Action Deny or Substantially Diminish a Fundamental Attribute of Property Ownership?

Regulations or actions that deny or impair a landowner's ability to exercise a fundamental attribute of property ownership are potential takings which should be analyzed further. The fundamental attributes of property ownership are generally identified as the right to own or possess the property, the right to exclude others from the property, and the right to transfer the property to someone else. *See Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). For example, regulations that prevent property from being inherited have been found to destroy a fundamental property attribute.

4. Does the Regulatory Action Have a Severe Impact on the Landowner's Economic Interest?

Not every reduction in the value of property requires the payment of just compensation. Courts have acknowledged that regulations are a necessary part of an ordered society and that they may limit the use of property, thereby impacting its value. Such reductions in value do not necessarily require the payment of compensation under either the federal or state constitutions.

However, if a regulation or regulatory action is likely to result in a substantial reduction in property value, the agency should consider the possibility that a taking may occur. In the absence of a complete deprivation of all value, a court will evaluate whether a taking has occurred by balancing the economic impact against two other factors: (1) the extent to which the government's action impacts legitimate and long-standing expectations about the use of the property; and (2) the character of the government's actions — is there an important interest at stake and has the government tended to use the least intrusive means to achieve that objective?

Other factors to consider include the absence or existence of reciprocal benefits and the manner in which the costs and benefits of regulations are shared. For example, zoning regulations may eliminate some profitable uses of property while simultaneously preserving or enhancing property value by limiting development activities (e.g., preventing industrial operations in residential neighborhoods).

These tests and indicators are important and useful because government actions are often characterized in terms of overall fairness. A taking is more likely to be found when it appears that the government's actions affirmatively work to acquire some public benefit and a single person is being asked to shoulder the cost of obtaining that public benefit. This is sometimes characterized as a situation in which a single property owner is forced to bear the burden of addressing some societal concern when in all fairness the cost ought to be shared across society.

As with warning signal 2, this evaluation of economic impact and balancing of other factors is normally applied to the property as a whole, not just the portion subject to regulation.

5. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement?

Regulation that requires a private property owner to formally dedicate land to some public use or that extracts an easement should be carefully reviewed. The dedication or easement that is required from the landowner must be reasonable and proportional — i.e., specifically designed to prevent or compensate for adverse impacts of a proposed development.

Ultimately, the government must demonstrate that it acted reasonably, that its actions were proportionate, and that its actions were undertaken to advance a legitimate state interest.

C. DISCUSSION OF CONSTITUTIONAL PRINCIPLES RELATING TO THE REGULATION OF PRIVATE PROPERTY

The following portion of this Advisory Memorandum outlines the principles that courts have used to determine whether a given government regulation effects a “taking” under the federal or state constitution and whether it violates principles of substantive due process.

1. Fifth Amendment Takings Clause

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. The government may not take property except for public purposes within its constitutional authority and only upon the payment of just compensation for the property that has been taken.

2. Washington State Constitution, Article 1, Section 16

Article 1, section 16 of the Washington State Constitution provides, in part, that “[n]o private property shall be taken or damaged for public or private use without just compensation.” In other words, the government may take private property, but must pay compensation for the private property that is taken.

Article 1, Section 16 also expressly prohibits state and local governments from taking private property for a private use with a few limited exceptions – private ways of necessity and drainage for agricultural, domestic or sanitary purposes. Legislation that attempts to take private property for a private use is invalid unless it falls within one of the enumerated exceptions.

3. The Exercise of Eminent Domain

Government has the power to condemn property for public use. Taking land to build a road is a classic example of when the government must provide just compensation for its exercise of the power of eminent domain. Private property also may be damaged as a necessary consequence of a government project that is undertaken to provide some public benefit. For example, if the construction of a road unnecessarily blocks access to an adjacent business resulting in a significant loss of business, the owner may seek just compensation for “damage” to the property.

The constitution requires private landowners to be compensated when they are singled out and their property is appropriated to provide some affirmative benefit to the public. This principle carries forward into the area of land use regulation. When government regulation becomes the functional equivalent of a condemnation, just compensation may be required. This aspect of takings law is not always easy to apprehend, but it is essentially an inquiry into the fairness of government action. At some point a regulation may extract so much value from a property, for a purpose that really provides benefits to the public rather than preventing harm, that it would simply be unfair to ask the individual landowner to bear that burden rather than spreading it to the public as a whole.

a. Condemnation Proceedings

Government historically acquires property and compensates landowners through a condemnation proceeding in which the appropriate amount of compensation is determined and paid before the land is taken and used by government. Washington’s laws provide that, in some

cases, property may be taken immediately with compensation being determined and paid in a subsequent judicial proceeding or by agreement between the government and landowner. *See* RCW 8.04.090.

b. Inverse Condemnation

The government may become liable for the payment of just compensation to private property owners whose land has been physically occupied or damaged by the government on a permanent or ongoing basis. This circumstance is generally referred to as an “inverse condemnation,” because the question of whether the government’s actions have damaged or taken property — and any corresponding amount of compensation — is determined in a judicial proceeding brought by the landowner after the government has acted.

c. Regulatory Takings

It is well established in the law that zoning and other comprehensive regulations are a legitimate exercise of the government’s police powers. Accordingly, most comprehensive land use regulations that advance a legitimate public interest do not result in a taking of property. Nevertheless, a regulatory taking may occur if a regulatory law or action deprives property of all economic or productive value, results in a permanent occupation of property by government, destroys a “fundamental attribute of property ownership,” fails to substantially advance a legitimate state interest, or if the economic impact is severe in relation to the public purpose and the means used by the government to achieve that purpose. These various “tests” are discussed in greater detail below, and in the section identifying “warning signals.”

i) Categorical Takings

Certain forms of government action are characterized as “categorical” or “*per se*” takings. In these circumstances the government action is presumptively classified as a taking of private property for public use for which just compensation is required. The court does not engage in the typical takings analysis involving a detailed factual inquiry that weighs the utility of the government’s purpose against the impact experienced by the landowner.

Physical occupations of property are the most well understood type of categorical taking. When the government permanently or repeatedly physically occupies property, or authorizes another person to do the same, this occupation has been characterized as such a substantial interference with property that it always constitutes a taking requiring the payment of just compensation.

A regulation that deprives a landowner of all economic or beneficial use of property or that destroys a fundamental property right (such as the right to possess the property, the right to exclude others, or the right to dispose of the property) is another form of categorical taking. However, a regulation that prohibits all economically viable or beneficial use of property is not a taking if the government can demonstrate that the proposed use of the property that is being denied is prohibited by laws of nuisance or other long-standing and pre-existing limitations on the use of property.

Courts have emphasized that these “categorical” forms of taking arise in exceptional circumstances and that the tests are narrowly tailored to deal with these exceptional cases.

ii) Balancing the Severity of Regulatory Activity

Ascertaining whether a government regulation goes so far as to take private property usually requires a detailed factual investigation into the purpose of the government regulation, the means used to achieve the government's purpose, and the financial impact on the individual landowner. The majority of regulatory takings cases will involve this more traditional multi-factor analysis that weighs the impact of government regulation against the government's objectives and the means by which they are achieved.

If government has authority to deny a land use, it also has authority to *condition* a permit to engage in that use. For example, a local government may condition a development permit by requiring measures that mitigate identifiable adverse impacts of the development. However, a permit condition that imposes substantial costs or limitations on the use of property could be a taking.

In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts weigh the public purpose of the regulatory action against the impact on the landowner's vested development rights. Courts also consider whether the government could have achieved the stated public purpose by less intrusive means. One factor used to assess the economic impact of a permit condition is the extent to which the condition interferes with a landowner's reasonable investment-backed development expectations.

Most courts recognize that this balancing analysis is a case-by-case factual inquiry into the fairness of the government's actions. Economic impacts from regulation are usually fair and acceptable burdens associated with living in an ordered society. The federal and state constitutions do not require the government to compensate landowners for every decline in property value associated with regulatory activity. However, government action that tends to secure some affirmative public benefit rather than preventing some harm, or that is extremely burdensome to an individual's legitimate expectations regarding the use of property, or that employs a highly burdensome strategy when other less burdensome options might achieve the same public objective, raises the possibility that the action may be a taking of private property. A useful way to approach this principle is to consider whether there is any substantial similarity between a proposed regulatory action and the traditional exercise of the power to condemn property. When government regulation has the effect of appropriating private property for a public benefit rather than to prevent some harm, it may be the functional equivalent of the exercise of eminent domain. In those cases the payment of just compensation may be required.

Washington's rather detailed test for evaluating takings claims was set out by the State Supreme Court in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). See Appendix A and discussion of that case for a step-by-step application of the takings test in Washington.

iii) Permit Conditions That Exact Some Interest in Property

Sometimes a permit condition will attempt to extract a fee or some interest in property as mitigation for the adverse public impact of the proposed development. Courts have referred to these types of conditions as *exactions*. While such exactions are permissible, government must identify a real adverse impact of the proposed development and be prepared to demonstrate that the proposed exaction is reasonably related to that impact. The government also must be prepared to demonstrate that the burden on the property owner is roughly proportional to the impact being mitigated.

The limitations that are placed upon property exactions are further discussed in the Appendix A case note relating to the United States Supreme Court decision in *Dolan v. City of*

Tigard, 512 U.S. 374 (1994), and in the case notes discussing some of the more recent Washington cases following *Dolan*.

4. Substantive Due Process

In addition to the takings clause, the Washington State Supreme Court has held that landowners are protected from unduly oppressive regulation by the substantive due process limitations of the Fourteenth Amendment to the United States Constitution. To date, Washington courts have relied only on the Fourteenth Amendment in the land use context, without deriving independent substantive due process protection from the due process clause in Article 1, Section 3 of the Washington Constitution.

Washington courts have expressed a willingness to consider both takings claims and due process claims at the same time. In contrast, federal courts sitting in Washington have dismissed Fourteenth Amendment substantive due process claims where a remedy is available by bringing a takings claim under the Fifth Amendment Takings Clause. See *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc).

Our State Supreme Court's approach to due process in a land use regulation context was first developed in *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 787 P.2d 907, cert. denied, 111 S. Ct. 284 (1990), and refined in *Guimont and Margola Assoc. v. Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993). These decisions emphasize that even if a regulation does not amount to a taking, it is subject to substantive due process requirements. In assessing whether a regulation has exceeded constitutional limitations, the Court considers three questions. First, is the regulation aimed at achieving a legitimate public purpose? There must be a public problem or "evil" that needs to be remedied for there to be a legitimate public purpose. Second, is the method used in the regulation reasonably necessary to achieve the public purpose? The regulation must tend to solve the public problem. Third, is the regulation unduly oppressive on the landowner? If so, there may be a due process violation.

The "unduly oppressive" inquiry involves balancing the public's interests against those of the regulated landowner. Factors to be considered in analyzing whether a regulation is unduly oppressive include:

1. The nature of the harm sought to be avoided;
2. The availability and effectiveness of less drastic protective measures; and
3. The economic loss suffered by the property owner.

In assessing these three factors, the Court directed trial courts to the following considerations:

On the public's side — the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it, and the feasibility of less oppressive solutions.

On the owner's side — the amount and percentage of value loss, the extent of remaining uses, the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation, and how feasible it is for the owner to alter present or currently planned uses.

A statute or regulation may attempt to impose new standards for previously-authorized conduct or may attempt to remedy newly-discovered impacts from conduct that was previously legal. The requirements of due process do not automatically prohibit such legislative action.

Legislation that imposes retroactive liability or requires a change in conduct may be acceptable so long as it serves a rational purpose. However, it is also important to note that retroactive legislation is not favored because “elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”

In light of the principles discussed above, courts tend to apply a stricter standard of rationality to retroactive legislation than to prospective legislation. The fact that legislation may be rational when applied prospectively does not mean it will necessarily be rational when applied retroactively. There must be some independent rational basis for the retroactivity itself. Some of the additional factors to consider when evaluating the retroactivity of legislation include the following:

1. Is there a direct relationship between the conduct of the landowner and the “harm” that is being remedied?
2. Is the “cure” that is being imposed proportional to the harm being caused?
3. Could the landowner have generally anticipated that some form of retroactive regulation might occur? There is some reason to believe that this issue of “foreseeability” acquires greater importance where there is a weak link between the landowner’s conduct and the “cure” being imposed by the government.

These standards are not individually determinative; they operate together to paint a picture that speaks to the “fairness” of retroactive regulation. *See Rhod-A-Zalea & 35th Inc. v. Snohomish Cy.*, 136 Wn.2d 1, 959 P.2d 1024 (1998).

5. Remedies

In the usual condemnation case, the government must pay compensation to a property owner before the property may be taken and used for a public purpose. Compensation is usually based on the fair market value of the property at the time of the taking.

In an inverse condemnation case under RCW 8.04.090, compensation is due the property owner for a taking that occurred without compensation first having been paid. Compensation usually is based on the fair market value of the property actually taken, at the time of the taking, and the government also may be liable for interest and the property owner’s legal expenses incurred in obtaining compensation.

If a court determines that there has been a regulatory taking, the government generally has the option of either paying just compensation or withdrawing the regulatory limitation. However, even if the regulation is withdrawn, the government might be obligated to compensate the property owner for a temporary taking of the property during the period in which the regulation was effective.

If a court determines a regulation has taken private property for private use, the court probably will invalidate the regulation rather than ordering compensation. *See Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000).

If a court determines there has been a substantive due process violation, the appropriate remedy is invalidation of the regulation. *See Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). A prevailing landowner who also proves that the government's actions were irrational or

invidious may recover damages and reasonable attorney's fees under the Federal Civil Rights Act.

6. Statutory Restraints on Unlawful Permitting Decisions

Under Washington law, a property owner who has filed an application for a permit may have a cause of action for damages to obtain relief from government actions which were arbitrary, capricious, or made with the knowledge that the actions were in excess of lawful authority. *See* RCW 64.40. This statute also provides relief for failure to act within the time limits established by law.

7. Burdens of Proof and Prerequisites to the Filing of a Claim

A person challenging an action or ordinance generally has the burden of proving that the action or ordinance violates the constitutional provision. However, when the government exacts land to mitigate for adverse impacts, it must be able to identify a specific impact that needs to be mitigated and demonstrate that the exaction is roughly proportional to the identifiable impact.

A claim that property has been taken may not be brought until the landowner has exhausted all administrative remedies and explored all regulatory alternatives. This means that the landowner generally must submit an application and pursue available administrative appeals of any action that the landowner contends is erroneous. Furthermore, the landowner must allow the planning or regulatory agency to explore the full breadth of the agency's discretion to allow some productive use of property. This may include seeking variances and submitting several applications to determine the full extent to which the regulatory laws may allow or limit development. However, the landowner should not be made to explore futile options that have no practical chance of providing meaningful use of the land. Once the government comes forward with evidence that there are regulatory options which might provide for some use of the land, the landowner has a heavy burden to show that pursuing these options would be futile. *See Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 768 P.2d 462 (1989).

In some cases a landowner may pursue a "facial challenge" to a law claiming that the mere enactment of legislation results in a taking or violates due process. These are difficult cases to make because legislation is presumed constitutional and the landowner must demonstrate that under every conceivable set of facts the challenged legislation is constitutionally defective. *See Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000).

III. RECOMMENDED PROCESS

The recommended process for evaluating constitutional principles when undertaking land use planning and permitting activities is as follows:

1. Advisory Memorandum Developed. The Attorney General's Office prepares and distributes an Advisory Memorandum (Section I) to all government agencies in Washington that exercise regulatory authority impacting private property rights. This Advisory Memorandum outlines constitutional principles relating to the taking of property and the application of substantive due process when the government takes some action affecting property. The memo includes discussions of recent Supreme Court decisions, along with examples of specific types of situations that may raise constitutional questions.

2. Review and Distribute the Advisory Memorandum. Local governments and state agencies should review the Advisory Memorandum with their legal counsel and distribute it to all decision makers and key staff. Agency decision makers at all levels of government should

have consistent, authoritative guidance on the applicable constitutional limitations. This is particularly important for potential property uses which may be subject to the regulatory jurisdiction of multiple agencies.

3. Use the “Warning Signals” to Evaluate Regulatory Actions. Local governments and state agencies may use the “warning signals” in the Advisory Memorandum as a checklist to determine whether a proposed regulatory action may violate a constitutional requirement. The warning signals are phrased as questions. If there are affirmative answers to any of these questions, the proposed regulatory action should be reviewed by staff and approved by counsel.

4. Develop an Internal Process for Assessing Constitutional Issues. State agency and local government actions implementing Growth Management Act programs should be assessed by both staff and legal counsel. Examples of these actions include the adoption of development regulations and designations for natural resource lands and critical areas, and the establishment of policies or guidelines for conditions, exactions, or impact fees incident to permit approval. A similar assessment, by both staff and legal counsel, should also be used for the issuance or denial of permits for land use development. Regulatory or administrative actions proposed by state agencies should be assessed by staff and legal counsel if the actions may impact private property.

5. Incorporate Constitutional Assessments Into the Agency’s Review Process. A Constitutional assessment should be incorporated into the agency’s review process. The nature and extent of such assessment, however, will necessarily depend on the type of regulatory action and the specific impacts on private property. Consequently, each agency should have some discretion to determine the extent and the form of the assessment. For some types of actions, the assessment might focus on a specific piece of property. For others, it may be useful to consider the potential impacts on types of property or geographic areas. It is strongly suggested, however, that any government regulatory actions which involve warning signals be carefully and thoroughly reviewed by legal counsel. The Legislature has specifically indicated that the assessment process used shall be protected by attorney-client privilege.

APPENDIX A

This Appendix includes lists of *some* of the principal cases dealing with takings and/or related due process issues together with a short summary of the result in each case. These cases provide examples of how federal courts and Washington courts have resolved specific questions and may be helpful for assessing how courts might resolve analogous situations. There are many takings cases not discussed here, as well as several excellent law review articles on the subject.

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1. SUMMARIES OF RECENT SIGNIFICANT FEDERAL AND WASHINGTON STATE “TAKINGS” CASES (Reverse Chronological Order)

A. FEDERAL CASES

***Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)**

A landowner was denied a permit to fill wetlands as part of a plan to build several waterfront homes. The landowner then sued alleging that the property had no value and had been taken under the “total deprivation of all value” test laid out in *Lucas*. The planning agency responded that the claim was not ripe because the landowner had not sought a variance. Furthermore, the agency argued that, because the landowner had acquired the property after the effective date of the regulation, this constituted a preexisting limitation on the use of property and cut off any taking claim. Finally, they argued that the evidence showed that at least one home could be built on the portion of the property that did not need to be filled so no *Lucas* claim existed. The court reaffirmed that a case is not ripe where a planning agency retains the discretion to allow some alternate form of valuable development. However, the Court noted that while the applicable ordinance allowed for variances based upon a showing of “compelling public purpose,” the planning agency had already indicated that no compelling interest could be shown. Accordingly, it would be futile to make the landowner go through the motions of attempting to obtain a variance. On the issue of pre-existing property limitations, the Court noted that this theory may apply to cut off a taking where the background limitation on property uses has always existed, as a part of the law of property. However, this principle should not be applied to newly enacted regulations as some bright line cut off of any subsequent claim that the newly enacted regulations are so onerous that they amount to a taking. Instead, the fact that a property owner may have acquired property with the knowledge that a previous regulation might preclude certain land uses could be weighed as part of the *Penn Central* balancing test when evaluating a landowner’s legitimate investment expectations. Finding that the entire property retained some value, the Court rejected the *Luca*-based takings claim and remanded the case back for a determination of whether taking had occurred using the *Penn Central* three-factor balancing test.

B. WASHINGTON CASES

***Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.2d 183 (2000)**

In 1993 Washington enacted legislation designed to deal with the problems facing low income and elderly mobile home tenants, as space for mobile homes became increasingly scarce. The legislation gave qualified mobile home tenant organizations a right of first refusal to purchase mobile home parks when the landlord decided to sell the land. The mobile home park owners complained that granting a right of first refusal would impair their power to negotiate the best sale of their property and that the enactment of the legislation took their property. The court agreed. It first conducted a *Gunwall* analysis to determine if Washington’s Constitution provides greater protection than the federal Constitution. The court concluded that the opening portion of Article I, Section 16 prohibiting the State from taking private property for a “private use” provides greater protection than the federal Constitution. Following this conclusion, the court concluded that the “right of first refusal” was a significant interest in property that had been impinged upon. Furthermore, the court found that the legislation transferred the property interest from the mobile home park owner to a third person — the mobile home tenant’s association. A finding that fundamental property interests have been impinged upon normally leads to a *Penn Central* type of analysis. However, the court concluded that when this is combined with a

transfer of the property interest, this is the functional equivalent of the exercise of eminent domain and constituted a taking of the property. The court next concluded that while the transfer of the right of first refusal to the tenant's association might further a public goal, it was predominantly for the benefit of private persons and was thus prohibited under Article I, Section 16. Accordingly, the law was invalidated.

2. SUMMARIES OF SIGNIFICANT "TAKINGS" CASES FROM THE U.S. SUPREME COURT (Chronological Order)

***Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)**

A physical invasion of property, no matter how slight, will categorically constitute a taking of that portion of the property occupied for the period that it is occupied.

A New York State statute required landlords to allow the installation of cable television on their property. The owner of an apartment building in New York City challenged the statute, claiming an unconstitutional taking of private property. The installation in question required only a small amount of space to attach equipment and wires on the roof and outside walls of the building. The United States Supreme Court ruled that the statute was unconstitutional, concluding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." The Court reasoned that an owner suffers a special kind of injury when a "stranger" invades and occupies the owner's property, and that such an occupation is "qualitatively more severe" than a regulation on the use of property.

***Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)**

Regulatory actions that permanently deprive property of all its economic vitality are a categorical form of taking that does not need to be evaluated using the Penn Central balancing test. However, if the government can show that fundamental principles of property law or nuisance would not have supported the desired use of the property, there is no viable taking claim even if this leaves the property valueless.

Mr. Lucas bought two South Carolina beachfront lots intending to develop them. Before he initiated any development of the lots, the South Carolina Legislature enacted the Beachfront Management Act, which prevented development of the lots. The parties stipulated that the parcels had no remaining value. The United States Supreme Court held that a regulation which "denies all economically beneficial or productive use of land" is an unconstitutional taking unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other preexisting limitations on the use of property. The Court noted that such total takings will be "relatively rare" and the usual balancing approach for determining takings will apply in the majority of cases.

***Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 104 (1994)**

Permit conditions that extract something from a landowner must not only have some nexus to an identifiable impact, the scope of the condition must also be "roughly proportional" to the impact being mitigated.

The owner of an electrical and plumbing supply business applied to the city for a permit to expand the facility located on a parcel adjacent to a stream. The City approved the permit with several conditions. First, the owners were to be prohibited from developing within the 100-year floodplain of the stream. Also, the owners would have to grant an easement for public access

along the floodplain. The City also required provision for a bike path across the parcel to connect to the City's path system.

The Supreme Court first was careful to distinguish between quasi-legislative comprehensive land use regulation and the more restrictive requirements for imposing permit conditions in an adjudicative context, as in this case. The Court then proceeded to consider whether the permit conditions were reasonably related to a legitimate public purpose, the essential nexus test. The ban on development in the floodplain was found to be reasonably related to mitigating surface water runoff from the project. However, the Court found no legitimate purpose in the required public easement across the floodplain, a requirement that deprived the owners of the fundamental right to exclude others.

The Court also found that the bike path could be a reasonable requirement to mitigate the impact of increased traffic due to the expansion of the business. However, the Court was troubled by the lack of evidence on the magnitude of any traffic impact. The Court decided that in addition to meeting the reasonable relationship test, the City must show the permit requirement to be roughly proportional to the expected impact. The case was remanded to make that determination.

3. SUMMARIES OF SIGNIFICANT WASHINGTON STATE "TAKINGS" CASES (Chronological Order)

***Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987)**

The Orion Corporation was denied a shoreline permit to build a residential community on tidelands in Padilla Bay. This case contains extensive discussions of the evolving notion of regulatory takings. Many of the principles discussed have been more fully developed since the time this opinion was issued. However, in addition to the interesting historical look at the development of the law, the case continues to be noteworthy for its conclusion that private interests in navigable waters are burdened by public interests under the Public Trust Doctrine and the government may prohibit development actions that impair this public interest without taking the private property interest and without violating principles of due process so long as the State's actions were reasonably tailored to prevent an impairment of the public's interest in the property.

***Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 768 P.2d 462 (1989)**

Where a regulatory agency retains some discretion to allow profitable uses of land, a taking claim is not ripe for adjudication. This is the case because there is some chance the land may be put to a valuable use and there is no basis to conclude that a final regulatory disposition exists that clearly shows the economic impact of the regulatory program. This is a judicial question, not a jury question. Moreover, the burden is on the landowner to demonstrate that it would be futile to pursue available development alternatives and the landowner's burden in this regard is substantial.

***Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, cert. denied, 111 S. Ct. 284 (1990)**

The State Supreme Court found that landowners may challenge regulatory activity on both takings and due process grounds. The Court attempted to distinguish the two theories and provided an analytical framework for analyzing such claims.

The Court's analysis first considers whether a regulation safeguards the public interest in health, safety, the environment, or fiscal integrity of an area rather than seeking to acquire some benefit for the public. If so, the regulation is not normally a taking. The constitutional validity of such a regulation would then be analyzed by considering whether it violates substantive due process. The remedy for a violation of due process is normally invalidation of the ordinance.

On the other hand, if the regulation went beyond safeguarding the public's interests and worked to enhance a public interest, or if it destroyed a fundamental attribute of property ownership (the right to possess, to exclude others, or to dispose of property), then the regulation would be subject to analysis under the "takings" clause.

A taking analysis in a particular situation would first involve an assessment of whether the regulation substantially advances a legitimate state interest. If it did not, then there would be a taking. If the Court determined that the regulation substantially advanced a legitimate state interest, then it would be necessary to assess the extent of the economic impact on the property subject to the regulation. Here the Court employs the balancing test laid out in *Penn Central*. If the Court, after weighing and balancing the interests, found that there had been a taking, just compensation would be required.

This test has been re-worked to accommodate more recent United States Supreme Court holdings as discussed in *Guimont*, below.

***Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993)**

In 1989, the Legislature adopted the Mobile Home Relocation Assistance Act. In essence, the Act required owners of mobile home parks to establish a fund to financially assist tenants in moving their homes should the owner decide to close the park or change the property to another use. The Act was challenged by park owners on regulatory takings and due process grounds. In its first takings case since the United States Supreme Court's decision in *Lucas*, the State Supreme Court reviewed its *Presbytery* analysis and re-worked the analysis slightly to accommodate the *Lucas* holding. The Court mapped out the takings analysis in Washington using a two-step threshold analysis as follows:

The first threshold analysis determines whether regulatory activity deprives the owner of all economic value (*Lucas*) or causes a physical invasion (*Loretto*). If the answer is "yes" a taking has occurred (unless the background property limitation principle applies to a *Lucas*-type claim). These are the classic categorical or "*per se*" takings tests where the government's actions are not weighed against the financial impact.

The second threshold analysis asks two subsidiary questions: First, does the regulation impinge upon a fundamental attribute of property (the right to own property, exclude others or dispose of the property). See the *Hodel* and *Agins* United States Supreme Court cases. Second, does the regulatory action do more to prevent harm to the public than to acquire some affirmative benefit. If it does not impinge upon a fundamental attribute of property and if it manifestly prevents harm rather than acquiring a benefit for the public then no taking exists. Note that the harm/benefit test may be difficult to apply because the line between harm prevention, and benefit acquisition, may be difficult to distinguish.

If the regulatory action impinges upon a fundamental property interest, or if some public benefit is acquired, then the final takings analysis occurs. In the final takings analysis, the Court first asks if the regulatory action substantially advances a legitimate state interest. If it does not, it is a taking. If it does advance a legitimate state interest, the Court then uses the balancing test set forth in *Penn Central* to evaluate the economic impact of the government's actions against the purposes and methods used by the government.

In this case there was no taking because the landowners could still evict tenants and change the use of the property. However, the Court did find that the Act violated the due process clause. The Court reasoned that the potential financial impact of the relocation reimbursement requirements of the Act would be unduly oppressive on park owners. While the Act legitimately addressed the problem of declining space for mobile homes, the Court concluded that the park

owners were not more responsible for the problem than the general public. Accordingly, it was not fair for the government to saddle them entirely with the responsibility for addressing the stated public goal.

***Margola Assoc. v. Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993)**

Apartment house owners challenged a city ordinance that required owners of buildings with more than one housing unit to register with the city and pay an annual inspection fee. Owners who did not register could not evict a tenant. The Court found that the ordinance did not constitute a regulatory taking. The City had a legitimate interest in ensuring compliance with its housing code. No taking had occurred because the ordinance neither deprived the owners of all economic value nor amounted to a physical invasion. The Court observed that the restriction on eviction was not, in effect, a physical invasion, because the owners voluntarily rented the units. The Court also found that the owners had not been deprived of due process. The small annual fee, one-half of one percent of the average rent, was not, in the Court's view, an undue burden on the owners.